Office - Supreme Court, U.S.
FILED
FEB 10 1984
ALEXANDER L. STEVAS
CLERK

No. 82-1579

IN THE

Supreme Court of the United States

October Term, 1983

No. 82-1579

HAYFIELD NORTHERN RAILROAD COMPANY, INC.
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT REPLY BRIEF OF APPELLANTS

ROBERT S. ABDALIAN
1652 Greenview Drive S.W.
P.O. Box 6390
Rochester, MN 55903
Telephone: (507) 288-5567
Attorney for Appellant
Hayfield Northern Railroad
Company, Inc.
HUBERT H. HUMPHREY III
Attorney General
State of Minnesota
and
GILBERT S. BUFFINGTON
Special Assistant Attorney
General
Attorney for Appellant/
Intervenor State of
Minnesota
204 Administration Building
Saint Paul, MN 55155
Telephone: (612) 296-0315

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

Page

Argument

The Certificate Of Abandonment Means No More Than The Public Convenience And Necessity Permit Permanent Cessation Of The CNW Service On The Hayfield Segment. 2

The Abandonment Balance. 3

Abandoned Rail Property Is Not A Special Class Of Property. 4

Conclusion 6

TABLE OF AUTHORITIES

Cases:

Abandonment of Railroad Lines and Discontinuance of Service, 365 I.C.C. 249 3

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 3

Chicago & N.W. Transp. Co.—Abandonment—in Waukesha, Jefferson and Dane Counties, Wisc., I.C.C. Docket No. AB-1 (Sub-No. 144) (May 5, 1983) 2

Colorado v. United States, 271 U.S. 153 3

Purcell v. United States, 315 U.S. 381 3

Federal Statutory Provisions:

49 U.S.C. § 10903 4

49 U.S.C. § 10905 4

IN THE

Supreme Court of the United States

October Term, 1983

No. 82-1579

HAYFIELD NORTHERN RAILROAD COMPANY, INC.
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT REPLY BRIEF OF APPELLANTS

ARGUMENT

THE CERTIFICATE OF ABANDONMENT MEANS NO MORE THAN THE PUBLIC CONVENIENCE AND NECESSITY PERMIT PERMANENT CESSATION OF THE CNW SERVICE ON THE HAYFIELD SEGMENT.

All parties agree that the Interstate Commerce Commission has issued a certificate of abandonment on the Hayfield segment. The issuance of the certificate reflects the Commission's finding that the local community need for this segment was outweighed by interstate commerce generally and the economic burden to the Chicago and North Western Transportation Company (appellee) in continuing rail service on this segment. There is no warrant to appellee's suggestion that the determination by the Commission to permit the CNW to abandon the Hayfield segment is an affirmative grant of power by the Commission to the CNW to ignore state process. This segment is not insulated from a state condemnation by reason that it had previous status as rail property. Appellee's contention that a state condemnation is a collateral attack on the Commission's order is groundless since the condemnation action does not and could not address the order: it addresses the property itself. Once the certificate of abandonment was effective, the Commission jurisdiction ended, as did federal interest. *Chicago & N.W. Transp. Co.—Abandonment—in Waukesha, Jefferson and Dane Counties, Wisc.*, I.C.C. Docket No. AB-1 (Sub-No. 144) (May 5, 1983) (Set forth in the Appendix to Supplemental Memorandum of Appellant and Appellant/Intervenor).

THE ABANDONMENT BALANCE.

The Commission determines whether to permit an abandonment by balancing "the interest of those now served by the present line on the one hand, and the interest of the carrier and the transportation system on the other." *Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321, citing *Purcell v. United States*, 315 U.S. 381, 384 (1942). The Commission thus balances the benefits and burdens of abandonment between the community served by the carrier on the line and interests of the carrier and interstate commerce generally. See *Colorado v. United States*, 271 U.S. 153, 168-169 (1926). "In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make the issuance of the certificate dependent upon a specific finding to that effect." *Colorado v. United States*, at 169. Accordingly, avoidable costs and opportunity costs to the carrier in continued operations are proper elements for the Commission to weigh. If, as here, the balance points in favor of the needs of the private carrier over those of the community a certificate of abandonment issues, which permits cessation of service on the line. This certificate evidences that the rail line has lost its status as rail property and is no longer the subject of federal interest or commission jurisdiction. See *Abandonment of Railroad Lines and Discontinuance of Service*, 365 I.C.C. 249, 261 (1981) (". . . the disposition of rail property after an effective certificate of abandonment has been exercised is a matter beyond the scope of the Commission's jurisdiction, and within a State's reserved jurisdiction. Questions of title to, and disposition of, the property are

matters subject to State law.") The effective date of abandonment relieves the carrier of the burden of federal regulation on the line, but does not subordinate state interest in that line to the interests of the former carrier after abandonment, as appellee contends.

Notwithstanding the Commission finding that the public convenience and necessity permit abandonment, 49 U.S.C. §10903, Congress in enacting Section 10905 has provided a method in which service can continue and abandonment avoided. Under previous law, abandonment proceedings were often attended by delay pending negotiations on pre-abandonment transfer. Section 10905 is directed to that delay. Section 10905 provides that a pre-abandonment transfer, whether by subsidy or purchase, can postpone the abandonment process by no more than 110 days. Section 10905 is entirely silent on post-abandonment disposition of real property. In a Section 10905 disposition, service is continued, while a state condemnation only reaches property that has been abandoned and, thus, requires a fresh certificate from the ICC before service can be restored.

ABANDONED RAIL PROPERTY IS NOT A SPECIAL CLASS OF PROPERTY.

Section 10905 is designed to deal solely with pre-abandonment acquisitions. There is nothing in the language of the Act, legislative history, or decisions of the Interstate Commerce Commission or the courts to suggest that this is a special class of property that a state cannot condemn directly or by delegation.

Appellee contends that this property is insulated from a state condemnation that seeks to rededicate this property to

rail use. The avoidable costs, including opportunity costs, mentioned by the appellee supporting this contention are but elements looked to by the Commission in its determination to permit abandonment. The finding by the Commission that the CNW suffered opportunity costs on this segment is not an affirmative finding of entitlement to this lost opportunity, as contended by appellee. Brief at 31, 37. Opportunity costs are looked to by the Commission only as an aid in carrying out the mandate of balancing the interest of the carrier and the interest of the local community to determine whether abandonment is to be permitted. It is not an affirmative determination that the railroad is entitled to avoid opportunity costs under any circumstance.

There is no merit to appellee's contention that a condemnation action will unduly burden CNW. CNW is entitled to the same benefits and burdens on this property as any other Minnesota property owner. If the property sought to be condemned is unique or if a condemnation action would somehow disadvantage the CNW, the CNW can seek relief to protect it from any untoward result.

CONCLUSION

Accordingly, for the reasons stated in our main brief and in this brief, the judgment below must be reversed and the case remanded to the district court to fashion an appropriate remedy.

Respectfully submitted,

WARD & OEHLER, LTD.
By: ROBERT S. ABDALIAN
103 Omni Building
1652 Greenview Drive S.W.
P.O. Box 6390
Rochester, MN 55903
(507) 288-5567
Attorney for Hayfield Northern Railroad Company, Inc.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
By: GILBERT S. BUFFINGTON
Special Assistant
Attorney General
State of Minnesota
204 Administration Building
Saint Paul, Minnesota 55155
Telephone: (612) 296-0135
Attorneys for State of Minnesota